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January 22, 2007

Aram Hodess, Chairman
California Apprenticeship Council Rules &
Regulations Committee
c/o Plumbers & Steamfitters Local Union No. 159
1308 Roman Way
Martinez, Ca. 94553

Re: Comment on Agenda Items For
January 25, 2007 Rules & Regulations
Committee

Dear Chairman Hodess:

I would like to take this opportunity to substantively comment on the agenda items for the Rules and Regulations Committee set for January 25, 2007. I ask that you share these written comments with the other Committee members and the other CAC members.

Our firm represents scores of State approved Apprenticeship Programs currently training tens of thousands of apprentices in California along with the California Apprenticeship Coordinators Association, a state-wide association of apprenticeship coordinators. On behalf of our clients and our firm, we wish to stress that our main concerns are for the welfare of the apprentices and maintaining the high quality of apprenticeship that California has long been known for.

I. CCR SEC. 212.2 – Eligibility and Procedure for DAS approval of an Apprenticeship Program – Proposed Pro-Forma Worksheet

While we applaud Chief Rowan's efforts to establish a pro-forma worksheet on financial ability for proposed new Programs, and we join in his expressed intention that such a financial worksheet be utilized, we do not believe this plan goes far enough in insuring the financial integrity of the proposed program as required by CCR Section 212.2.

Over the years, few, if any, issues have plagued the approval process more than the requirement that a new program demonstrate its financial integrity to operate the program. We have seen examples of complete underfunding (i.e., the Tamalpais Painting Program had only $10,000 in "seed" money with no commitment from the sponsoring employers to contribute thereafter); we have seen improper expenditures of program assets (i.e., the IRCC Program spending more than

its entire yearly budget on attorneys' fees rather than the training of apprentices; the PHCC Program allowing "classroom training" to be conducted by a foreman in his hotel room) and we have seen "promises" that in the "future" the money needed for classrooms, labs and instructors would be spent (i.e., WECA's lack of any labs in Southern California for their Southern California apprentices). In order to avoid a constant repeat of these problems, more than a worksheet is necessary at the beginning stages of the approval process.

We would suggest the following:

A. The Pro-Forma Financial Worksheet:

1. Every Proposed New or Expanded Program Should be Required to Submit a Detailed Annual Budget.

The proposed pro-forma worksheet is a good beginning, however, it does not account for many additional items that must be included in such a budget. For instance, the budget should provide for the costs of (a) classroom materials, equipment, tools, mock-ups, etc. (which, depending upon the craft, can be extremely expensive); (b) computers (for office clericals, coordinators, instructors and students); (c) continuing education for instructors; (d) professional assistance (legal, accounting, etc.); (d) automobile expenses such as purchase, lease or rental if owned by the program or reimbursement for use of personal automobiles if not owned by the program (for administrative staff, coordinators, etc.); (e) travel expenses for staff; (f) expenses for staff training; (g) telephone expenses (stationary phones, cell phones, DSL) etc.

Moreover, if the program does not have the requisite facilities needed for proper instruction of the apprentices (i.e., classrooms and labs), and simply anticipates that it will "in the future" obtain such facilities, we submit that the program should receive only "conditional" approval rather than full approval. The approval should be conditioned upon the acquisition of the necessary facilities so that, upon acquiring the facilities, the program can then begin indenturing apprentices, but not before. It is simply inappropriate to allow a program to indenture apprentices whom the CAC knows will not be receiving appropriate training for sometime into the future. While many new or expanding programs claim that they don't wish to spend the money until they know they have approval to operate, this requirement should not cause them any concern since they will have their "conditional" approval and will be able to operate as soon as they have fulfilled the commitment the program made when it sought approval.

In addition, the revenue details need to insure a continuing supply of income. There should be proof of a financial commitment from the sponsoring employers to contribute on all work (not just public works) in order to insure that the employers and the program are complying with California's Annualization Requirement; there should be proof that the employers will contribute to the program on behalf of all craft employees, not just when they are employing apprentices; and there should be proof that no monies received by the program can be returned to the employers, either directly or indirectly, in violation of ERISA. The Worksheet alone will not answer any of these questions or insure compliance.

There is no question but that an under-funded program cannot meet its responsibilities to adequately train the apprentices participating in its program. However, an over-funded program can provide a mechanism for legal abuse. Both problems can, however, be addressed with proper regulations.

First, the obligation to properly fund the program should not be voluntary. Rather, it should be mandatory that every employer who is approved to train apprentices participating in the program must fund the program on a consistent, regular basis. The best way to satisfy this requirement is to require that the employers contribute an hourly amount on behalf of each of their employees working in the apprenticeable craft of the program. That means, an hourly contribution on behalf of each apprentice and journeyman employed at the craft.

Second, in order to avoid the problem of an "over-funded" sham program, the amount of the hourly contribution must be "reasonably related to the costs of training." This is a legal requirement mandated by Federal and State law. California Labor Code Section 1773.1(a)(6) provides that an employer may take credit for a prevailing wage contribution to "[a]pprenticeship or other training programs … so long as the cost of training is reasonably related to the amount of the contributions." This statute sets what is known as the "reasonable relation test." This test is meant to prevent the practice of contractors making excessive, sham contributions to apprenticeship training programs thereby paying their workers less than the prevailing wage on public works projects. See, *Miree Construction Corp. v. Dole*, 930 F.2d 1536 (11th Cir. 1991) and *Royal Roofing Company, Inc. (IRCC)*, ARB Case No. 03-127 (Nov. 30, 2004). While it is tempting to presume that an apprenticeship program can never be "over funded," the problem arises when the program uses the excess contributions not for training, but to defray other expenses (such as legal or political expenditures) or to divert the excess funds back to the sponsoring employers or employer association under the pretense of paying "administrative fees" and the like.

The question then becomes what hourly contribution rate is "reasonable?" One can assume that the training contribution contained in the published prevailing wage determination for the craft is a "reasonable" rate, especially since 8 C.C.R. Section 208 bases the apprentice's wage rate on the published prevailing wage determination. Thus, we would suggest that the regulation should be clarified that a program seeking initial approval or seeking approval for an expansion should show proof that it is mandatory for sponsoring employers to make the hourly contribution for training specified in the published prevailing wage determination for all hours worked in the applicable craft by apprentices and journeymen.

Third, in order to avoid the legal problems of sham contributions to an apprenticeship or training program, one must take into account the "annualization" principle. See, *Miree Construction, supra.* In *Miree*, the employer made contributions to the apprenticeship program only for hours worked on public works projects and made no contributions for hours worked on private works projects. The Department of Labor and the reviewing Court rejected this approach, noting that a contractor's apprentices are enrolled on a yearly basis, not just when the contractor is performing public works jobs. The Court noted that if the credit rate were based only on hours worked on public works jobs, then the contractor would be paying a disproportionate amount of the

program's costs out of wages earned on public works, thus underpaying its workers on public projects. California, like the Federal government, has adopted the "annualization" principle for contributions to apprenticeship programs. (See, Cal. Labor Code Section 1773.1(d)) This, then, requires that contributions be made for hours worked on both public and private construction projects.

In sum, we submit that the program should submit evidence showing that:

A. All sponsoring employers are obligated to contribute an hourly rate to the program for all hours worked in the craft by apprentices and journeymen based on the training contribution rate contained in the applicable published prevailing wage determination; and

B. All sponsoring employers are obligated to contribute the hourly rate for all hours worked in the craft on both public and private construction projects; and

C. DAS should closely scrutinize the financial records of the program to make certain that funds contributed for training purposes are not diverted back to the contributing employers or employer association for non-training related expenses or for exorbitant payment of such things as "administrative" expenses, political contributions, etc.

2. Every Proposed New or Expanded Program Should Be Required to Demonstrate that It Has a One-Year Financial Reserve to Operate the Program.

Each apprentice who indentures into a program makes a commitment that for the next three, four or five years, that individual will agree to work for less money in return for training in his or her chosen craft. A program that is approved by the CAC should make no less of a commitment to the apprentice, namely, that the program will be in existence throughout the individual's apprenticeship to provide the training promised.

A new or expanding program should be required to demonstrate that it has at least a one- year financial reserve to keep the program operating in the event of a turn-down in the industry so that we do not end up with a number of stranded apprentices in search of either a new program or a new career.

B. Instructor/Journeyman Certification Form:

We support the use of an Instructor/Journeyman Certification Form, however, we believe that additional ***proof*** of the information contained therein must be provided.

8 C.C.R. Section 205(a) and (b) provide:

"(a) 'Journeyman' means a person who has either

(1) completed an accredited apprenticeship in his/her craft, or
(2) who has completed the equivalent of an apprenticeship in

length and content of work experience and all other requirements in the craft which has workers classified as journeyman in the apprenticeable occupation.

(b) 'Instructor' means a person who has either

(1) completed an accredited apprenticeship in his/her craft, or
(2) who has completed the equivalent of an apprenticeship in length and content of work experience and all other requirements in the craft but may not necessarily be designated as a journeyman."

As we know, the law requires that apprentices must work **at all times** under the supervision of a journeyman. Too often, it is unclear what qualifications (if any) a so-called "journeyman" possesses to supervise the work and on-the-job training of apprentices at the jobsite or to serve as instructors in related and supplemental instruction. The original drafters of Section 205 (a) and (b) understood that on-the-job training, not to mention safety, is a critical component of the quality of an apprentice's education. As a result, the original drafters made clear what would be required – namely, either completion of an accredited apprenticeship in the relevant craft or the equivalent in length and content of work experience and all other requirements of the craft.

The question, of course, is what evidence should be available to make certain the "journeyman" meets those requirements set out in Section 205.

Each apprenticeship program knows the identity of the employers the **program has approved** to train apprentices. When a new program seeks initial approval, or an existing program seeks approval for an expansion, the program should submit proof that it has notified or will notify, in writing, all employers it has approved or will approve to train of the requirements of Section 205 (a) and (b).

With respect to instructors, each program should be required to keep records of the identity of the "journeyman" who serve as instructors and verifiable records that each individual meets the requirements of Section 205(a) and (b). This includes either proof that the "journeyman" has completed an accredited apprenticeship program, or verifiable proof of past work experience of the individual, in the form of employment records, to demonstrate that the individual has worked in the industry and at the craft a sufficient number of years/hours to be the equivalent of completion of an apprenticeship program in length and content of work experience. If the craft requires certification, such as electrical certification or welding certification, the program should maintain proof that the individual instructing the apprentice possesses the required certification. A simple statement that the person has worked the requisite number of years/hours at the craft without verifiable back-up proof is not sufficient. Moreover, such verifiable back-up proof should not be difficult to obtain, either by payroll records, W-2 forms, or the like.

Each program should be required to keep these records for each instructor to demonstrate that the individual meets the requirements of Section 205, and all such records should be scrutinized by DAS prior to recommending approval of a new program or approval of expansion of an existing program, as well as being available to DAS for a routine audit or for cause audit.

C. What Programs Could Reasonably Be Expected to Dispatch Apprentices to Employers.

Many employers are intentionally evading their responsibility under the Labor Code to hire apprentices by purposefully requesting the dispatch of apprentices from Apprenticeship Programs they know cannot dispatch apprentices to their jobsites. And, unfortunately, many Apprenticeship Programs are complicit in this scheme by continuing to receive apprenticeship contributions on public works jobs from these employers, knowing that they will never dispatch an apprentice to the employer's jobsite.

The undersigned had intimate experience with this scheme recently in an arbitration under the Project Labor Agreement for the Oakland Public Schools. In that case, an employer who acknowledged that 70% of his work consists of public works jobs showed the employment of ***no apprentices*** on any of his certified payrolls. When asked under oath why this was the case, he stated that the apprenticeship program from which he seeks apprentices had ***never been able to send him one***, although he continued to make his contributions to that program.

Allowing such schemes to continue is unfair to legitimate contractors who take their responsibility to hire and train apprentices on public works seriously. Although at first blush it may seem less expensive to hire an apprentice, in reality, it is more expensive. An apprentice is not as productive as a journeyman, apprentices take time away from the journeymen who must supervise and training the apprentices on the job, and the workers' compensation premiums are higher for apprentices than for journeymen. Thus, the courts have recognized that a deliberate failure to hire apprentices as required by the California Labor Code may serve as a predicate offense to an Unfair Competition Act lawsuit.

It simply strains credulity to believe that an employer working in Southern California can reasonably expect that an apprenticeship program whose area of operation is Northern California will be able to dispatch an apprentice to the employer's job site, or vice a versa. Besides the prohibitive expenses the apprentice would incur (i.e., travel, motels, meals, etc.), the program would not have a coordinator readily available to assist the apprentice with any problems he or she may encounter, and there would be no reasonable accommodation that could be made to insure that related and supplemental instruction actually takes place.

In order to stop this shameful practice of evading the apprenticeship hiring requirements of the Labor Code, the CAC should enact reasonable regulations that require employers to request the dispatch of apprentices from only those State-approved apprenticeship programs whose area of operation encompasses the geographical jurisdiction of the jobsite in question. An apprentice who is already on the employer's permanent workforce should be allowed to "travel" with the employer, so long as the employer pays the additional compensation needed by the apprentice to absorb the expenses of such travel, and so long as the employer and the dispatching apprenticeship program work out arrangements with an approved sister apprenticeship program in the geographic area of the jobsite to provide for RSI in the event the apprentice works outside his/her normal area for an amount of time that would interfere with the apprentice's regularly-scheduled RSI.

Thank you for the opportunity to comment on these important issues.

Sincerely,
/s/

Sandra Rae Benson

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